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In the Supreme Court of the United States

OCTOBER TERM, 1994

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., PETITIONERS

v.

ZIYA K. KORAY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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1. Respondent contends that the "plain meaning" of the phrase "official detention" includes restrictive conditions of release on bail, because federal courts act "officially" in setting bail and their bail orders curtail the defendant's liberty. Resp. Br. 26-27; see also Amicus USC Law Center's Post Conviction Justice Project (USC Law Center) Br. 12-13. That contention, however, "overlooks * * * th[e] fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal* v. *United States*, 113 S. Ct. 1993, 1996 (1993); see also *Gustafson* v. *Alloyd Co.*, 115 S. Ct. 1061, 1066 (1995). Here,

"[r]egardless of what the quoted phrase might mean standing alone," *Beecham* v. *United States*, 114 S. Ct. 1669, 1671 (1994), the context in which the phrase "official detention" is used makes clear that it cannot have the expansive meaning suggested by respondent.

Section 3585(b) refers to the legal rules that govern presentence restraints on liberty, because it contemplates credit only for time the defendant "has spent in official detention prior to the date the sentence commences." No federal court may "officially" order the defendant's "detention" before his sentence begins other than in accordance with the Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.* Under that Act, "[t]he judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community." *United States* v. *Salerno*, 481 U.S. 739, 751-752 (1987). When the judicial officer finds that those factors warrant "detention," the defendant must be placed in the custody of correctional authorities. See 18 U.S.C. 3142(i)(2). Any other resolution of the bail question results in the defendant's "release" either on his own recognizance or subject to specified statutory conditions. See 18 U.S.C. 3142(b) and (c)(1)(B). Indeed, the understanding that pretrial "detention" connotes the denial of bail to a defendant, and his resulting custody by correctional authorities, was reflected in this Court's decisions even before enactment of the Bail Reform Act of 1984. See, *e.g.*, *Bell* v. *Wolfish*, 441 U.S. 520, 531-535 (1979); see also *Block* v. *Rutherford*,

468 U.S. 576, 583 (1984); *Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975).

Respondent contends that the detention/release dichotomy of the Bail Reform Act of 1984 does not bear on the proper interpretation of 18 U.S.C. 3585(b), because in his view some of the conditions of "release" under the Bail Reform Act are comparable to conditions faced by "detained" prisoners. Resp. Br. 25-26. The bail statute, however, reflects Congress' view that placing a defendant in the custody of correctional authorities (detention) is so far different from other restraints on liberty that it should be used only as a last resort—*i.e.*, when less restrictive conditions, including residence in a halfway house, appear unlikely to assure the defendant's presence or the safety of the community. See 18 U.S.C. 3142(c) and (e); see also *Bell* v. *Wolfish*, 441 U.S. at 546 n.28 ("In the federal system, a detainee is committed to the detention facility only because no other less drastic means can reasonably assure his presence at trial," citing former 18 U.S.C. 3146). That scheme necessarily implies a judgment that conditions of the type imposed by respondent's bail package are less restrictive than detention in the custody of correctional authorities.

The context in which the phrase "official detention" appears in Section 3585(b) is significant for a second reason. By reducing a defendant's "imprisonment" by the amount of time spent in "official detention" before his sentence, Section 3585(b) posits that periods of presentence "detention" are equivalent to the "imprisonment" itself. Crediting time spent on bail against a sentence of "imprisonment," however, would require an apples-and-oranges comparison. Cf. *Jones* v. *Thomas*, 491

U.S. 376, 384 (1989) (noting that it is generally feasible to credit sentences when they are of the same "type," but that it would not be "possible to 'credit' a fine against time in prison"). Federal prisoners, unlike persons released on bail, are always subject to the supervision of correctional authorities. And when federal sentences include the type of community confinement at issue here, they do so as part of a sentence of "probation," not "imprisonment." See Gov't Br. 13-14. The fact that the type of halfway house confinement at issue here "is included as a condition of probation * * * persuasively indicates that Congress considered [that] confinement not to be the equivalent" of imprisonment and therefore "not to come within the ambit of 'official detention.'" *United States* v. *Zackular*, 945 F.2d 423, 425 (1st Cir. 1991).

Section 3585(a) of Title 18 poses a third contextual barrier to respondent's broad reading of the phrase "official detention." Section 3585(a) uses the phrase "official detention facility" to refer to a place where a federal sentence of imprisonment may be served, and the phrase "official detention" in the related provisions of Section 3585(b) must therefore be read to refer to a defendant's imprisonment in such a place. See, *e.g.*, *Gustafson* v. *Alloyd Co.*, 115 S. Ct. at 1066, 1067; *Ratzlaf* v. *United States*, 114 S. Ct. 655, 660 (1994). A sentenced prisoner may serve a federal sentence only while "committed to the custody of the Bureau of Prisons," 18 U.S.C. 3621(a), which by statute must "designate" a penal or correctional facility "that the Bureau determines to be appropriate and suitable" for the service of each inmate's sentence of imprisonment. 18 U.S.C. 3621(b). Thus, a defendant who is not in the custody of

correctional authorities is not subject to "official detention" within the meaning of Section 3585(b).

Respondent notes (Resp. Br. 12-16, 36; see also USC Br. 6-8)) that the Bureau of Prisons has statutory authority to permit service of a defendant's sentence in work release or a halfway house, see 18 U.S.C. 3622, 3624, and that the Bureau has issued a Program Statement permitting certain federal prisoners to serve the last part of their sentences of imprisonment in halfway houses. See Program Statement 7310.02 (Oct. 19, 1993).[1] While that is true, it does not help respondent's case. Our position is not that a halfway house can never be a "penal or correctional facility" where a federal sentence of imprisonment may be served, or that residence there can never amount to "official detention." The Bureau of Prisons designates inmates to a wide variety of institutions that subject the inmates to varying degrees of restraint on the basis of the Bureau's assessment of security or other needs for each inmate. See Gov't Br. 15-16. The only factors that unify those institutions are that (1) the inmates are in the legal custody of correctional personnel, who have "full discretion to control th[eir] conditions of confinement," *Moody* v. *Daggett*, 429 U.S. 78, 88 n.9 (1976); see also *Bell* v. *Wolfish*, 441 U.S. at 544-548 (similar discretion with respect to pre-trial detainees who are denied bail), (2) the inmates are subject to summary reassignment to any other facility within

[1] Program Statement 7310.02 is reprinted as an appendix to respondent's brief. The provisions of subchapter C of chapter 229, 18 U.S.C. 3621 *et seq.*, which govern the implementation of a term of imprisonment, are reprinted in an appendix to this brief.

the system, cf. *Meachum* v. *Fano*, 427 U.S. 215, 224-229 (1976), and (3) the inmates are subject to the Bureau's disciplinary procedures. Absent the Bureau's identity as legal custodian, a facility, standing alone, is not properly viewed as a place of "official detention."[2]

The identity of the custodian has legal as well as practical significance. Because respondent was not in the custody of the Bureau of Prisons, he could not have been summarily reassigned to a substantially less agreeable setting unless a judicial officer revoked respondent's bail or modified the conditions of his release. See 18 U.S.C. 3142(c)(3); see also *Randall* v. *Whelan*, 938 F.2d 522, 525 (4th Cir. 1991). Moreover, the statutory provisions and Program Statement on which respondent relies are subject to other conditions (apart from legal custody by the Bureau of Prisons) that respondent did not meet. For example, Program Statement 7310.02 provides that a halfway house or home confinement may be used as a transitional environment in order to ease an inmate's

[2] Amicus USC Law Center erroneously implies (USC Br. 6-7) that, by enacting 18 U.S.C. 4082, Congress has adopted a definition of "correctional facility" that categorically includes halfway houses irrespective of whether the defendant is in the legal custody of the Bureau of Prisons. Section 4082, which is reprinted in full in the appendix to this brief, merely provides that *when* the Attorney General (or the Bureau as her designee) has designated a facility for the confinement of a prisoner under her custody, a willful failure to remain in that facility will be deemed an escape. Not only does the title of Section 4082 make clear that the statute deals with "[c]ommitment[s] to Attorney General," but the statute's definition of "facility" to include a "residential community treatment center" is expressly limited by the phrase "[a]s used in this section." 18 U.S.C. 4082(c).

re-entry into society at the *end* of his sentence of imprisonment. See also 18 U.S.C. 3624(c); *Ramsey* v. *Brennan*, 878 F.2d 995, 997 (7th Cir. 1989) (policy of "facilitat[ing] the re-entry of convicts into society by making the last stage of their confinement transitional * * * has no application to a prisoner moving in the opposite direction"). Similarly, under Section 3622 the Bureau may furlough a prisoner in limited circumstances "if there is reasonable cause to believe that [he] will honor the trust to be imposed in him," and when it does so the Bureau may impose on him restrictions similar to the least restrictive bail conditions available under the Bail Reform Act. See 28 C.F.R. 570.36(d) (1994) (listing typical conditions of furlough). Nothing in those provisions supports the inference that residence in a halfway house, home confinement, or a furlough must *always* count as "imprisonment," even when the conditions that call those special provisions into operation are not satisfied.

Respondent also contends that the Bureau's interpretation of Section 3585(b) and its decision to deny him sentence credit conflict with its longstanding policy of granting credit to prisoners who were held in state custody before they were sentenced for a federal crime. Resp. Br. 16-17 & n.6; see also USC Br. 22-23. That is not correct. The Bureau's decision to grant credit to some state prisoners is supported by the legislative history of the Bail Reform Act of 1966, which made clear Congress' understanding that credit would be available for state custody in certain circumstances.[3]

[3] See H.R. Rep. No. 1541, 89th Cong., 2d Sess. 5 (1966) (credit would be available "for time spent in custody while

Moreover, the Bureau does not grant credit for state pre-trial detention unless the state judicial officer who determined the question of bail remanded the defendant to the custody of state correctional authorities—*i.e.*, no state prisoner is "detained" in an "official" way unless he is denied bail in accordance with applicable laws governing pre-trial restraints on liberty. That is the same definition of "official detention" that the Bureau applies to defendants who were arrested by federal authorities. By contrast, respondent was not denied bail, and he can point to nothing in the legislative history of the credit statute that suggests that Congress intended that credit be granted to one in his position. Indeed, respondent does not address our submission (Gov't Br. 17-21) that the history of federal statutes granting credit toward a sentence of imprisonment—particularly the fact that Congress has twice revised the credit statute at the same time it undertook to revise the bail laws—shows that Congress conceived of that credit as a corollary of a judge's decision to deny a defendant bail in accordance with applicable law.

2. Respondent does make one historical argument, but it does not assist him. As we demonstrated in our opening brief (Br. 20-21), by the time Congress enacted the current version of the credit provision in 1984, the courts of appeals had uniformly held that the phrase "in custody" in the predecessor statute did not

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awaiting trial where a defendant may have been originally arrested and held in custody on a State charge and eventually turned over to the Federal Government for prosecution of a Federal violation"); see also *id.* at 16 (credit available "for time spent in State custody on a charge which subsequently evolves as a Federal offense").

include restrictions imposed on a defendant's liberty as a condition of his release on bail. Respondent agrees with us (Resp. Br. 17), and with every court of appeals to consider the question, that the phrase "official detention" in Section 3585 means the same thing as the phrase "in custody" in the predecessor statute. Because respondent concedes that Congress' intent was to reenact the same understanding of "custody" that existed under the predecessor statute, this Court should "apply the presumption that Congress was aware of the[] earlier judicial interpretations and, in effect, adopted them" in the new credit provision. *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2043 (1993); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978).

Respondent claims that there should be no presumption that Congress reenacted the rule that time spent while released on bail is not creditable, because "the cases decided under the predecessor statute did not deal with defendants in halfway house confinement." Resp. Br. 19. The reenactment doctrine, however, does not impute to Congress knowledge of the specific facts of each case decided under the predecessor statute, but only knowledge of the rule of law or "test" adopted by those cases. Cf. *Fogerty* v. *Fantasy, Inc.*, 114 S. Ct. 1023, 1032 (1994). Before the credit statute took its current form in 1984, the courts of appeals had adopted a categorical rule that denied credit under the predecessor statute to prisoners who secured bail.[4] As this Court made

[4] See *Polakoff* v. *United States*, 489 F.2d 727, 730 (5th Cir. 1974) (Wisdom, J.) (time spent on "highly restricted bond" not creditable as "custody"); see also *United States* v. *Robles*, 563 F.2d 1308, 1309 (9th Cir. 1977) ("time spent on bail or on bond

clear in *United States* v. *Wilson*, 112 S. Ct. 1351, 1355 (1992) (internal quotation marks omitted), "[i]t is not lightly to be assumed that Congress intended to depart" from the rule followed under the predecessor statute when it enacted the credit provision of Section 3585(b).[5]

3. The language and history of Section 3585(b) establish that Congress intended that a defendant who is released on bail not receive sentence credit under Section 3585(b). If there is any need for further

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pending appeal is not time served 'in custody' "), cert. denied, 435 U.S. 925 (1978); *Ortega* v. *United States*, 510 F.2d 412, 413 (10th Cir. 1975) ("custody" relates "to actual custodial incarceration" not "the time a criminal defendant is free on bond"); *United States* v. *Peterson*, 507 F.2d 1191, 1193 (D.C. Cir. 1974).

[5] Respondent notes that the Bail Reform Act uses the term "custody" in describing certain conditions of release. See, *e.g.*, 18 U.S.C. 3142(c)(1)(B)(i) (court may release defendant to the custody of responsible person). He contends that our argument that "custody" and "official detention" are synonymous must mean that an order providing for a form of "custody" under the Bail Reform Act amounts to "official detention" under Section 3585(b). Resp. Br. 18. The problem with that argument is that we have never contended that the word "custody" means the same thing in all federal statutes in which it is used. Our position instead is that *as used in the predecessor credit statute*, the word "custody" was intended by Congress, and was uniformly construed by the courts before 1984, to describe only cases in which a defendant was not released on bail—and that that narrow meaning should therefore inform the Court's construction of the phrase "official detention" in the new statute. It is true that in some other statutory contexts, see *e.g.*, *Maleng* v. *Cook*, 490 U.S. 488, 491 (1989) (habeas corpus), the term "custody" has a broader meaning, but even respondent does not contend that the broadest legal definition of the term "custody" should be applied to the credit statute.

definition of the statute, however, deference is owed to the Bureau of Prisons' interpretation. Respondent fails to show that the Bureau's interpretation of "official detention" is not entitled to deference. First, respondent has not demonstrated that Congress had a clear and unambiguous intention to award credit to defendants who have been released on bail under restrictive conditions. Respondent and his amicus simply assume that Congress must have intended that credit be granted to one in respondent's position, because some dictionary definitions of the phrase "official detention" are broad enough to encompass respondent's conditions of bail. Resp. Br. 26-27; see also USC Br. 12-13. As this Court has noted, however, "[t]he existence of alternative dictionary definitions of the" relevant statutory terms, "each making some sense under the statute, itself indicates that the statute is open to interpretation" by the agency. *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1402 (1992); see also *Sullivan* v. *Everhart*, 494 U.S. 83, 91-92 (1990).

Adopting the reasoning of the court of appeals (Pet. App. 9a), respondent also argues that the Bureau's interpretation is not entitled to deference because it was not embodied in a legislative rule subject to notice-and-comment rulemaking. Resp. Br. 22-23. That is not a requirement for deference, however. Legislative rules, issued after notice and comment pursuant to delegated authority, have the binding force of law and are "entitled to more than mere deference or weight." *Batterton* v. *Francis*, 432 U.S. 416, 425-426 & n.9 (1977). The Bureau, however, has never contended that its Program Statements dealing with sentence credit *are* law, and its failure to engage

in notice-and-comment rulemaking is therefore irrelevant. The Bureau's Program Statements instead are informal pronouncements akin to "interpretive rules" that "do not require notice-and-comment," *Shalala* v. *Guernsey Memorial Hosp.*, 115 S. Ct. 1232, 1239 (1995), but which are nonetheless entitled "to some weight on judicial review." *Martin* v. *OSHRC*, 499 U.S. 144, 157 (1991).

Respondent also relies on the court of appeals' view that the Bureau has abandoned the interpretation of custody that it followed under the predecessor statute. Resp. Br. 20-21. The change in policy, however, concerns only a limited class of people who were ordered to spend nights or weekends in the custody of correctional authorities. Respondent is not a member of that class and the change did not implicate him or those in his situation at all, because it has always been the Bureau's view that "[t]ime spent * * * in a residential community center * * * as a condition of bail or bond * * * is not creditable as jail time." Program Statement No. 5880.24 (Sept. 5, 1979) (Pet. App. 37a); cf. *Ehlert* v. *United States*, 402 U.S. 99, 105-107 (1971). Thus, with respect to the issue raised by the facts of this case, the Bureau's policy has remained consistent and unchanged. Indeed, in denying respondent's administrative request for sentence credit, the warden relied on the Program Statement issued under the predecessor statute as authority for his action. J.A. 30.[6]

[6] As we explain in our opening brief (Br. 23-25), in 1975 the Bureau revised its policy with respect to jailed defendants who are nominally released on bail, after a federal court rejected the Bureau's argument that credit was not warranted even in those circumstances. Respondent does not challenge our explanation, does not offer any example in which that policy

4. Respondent also suggests that the rule of lenity requires adoption of his interpretation of Section 3585(b), because "there is a split of authority in the [c]ircuits concerning the reach of 'official detention.'" Resp. Br. 34 & n.13. There is no ambiguity in this case of the type that calls into play the rule of lenity. Unlike the principle of administrative deference, which uses the concept of "ambiguity" to recognize that Congress intends that administrative agencies will fill in the details of how statutes operate, the rule of lenity applies only if a statute is "ambiguous" in the special sense that "after seizing every thing from which aid can be derived," *Smith* v. *United States*, 113 S. Ct. 2050, 2059 (1993) (internal quotation marks and brackets omitted); see also *Chapman* v. *United States*, 500 U.S. 453, 463 (1991), the court can "make no more than a guess as to what Congress intended." *Ladner* v. *United States*, 358 U.S. 169, 178 (1958). As we have explained, the

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was applied to anyone beyond the limited context of defendants who were ordered to spend time in the custody of correctional authorities, and does not give any legal reason why a policy adopted under the perceived compulsion of a federal district court should be deemed to embody the *Bureau's* view of the law. Cf. *United States* v. *Williams*, 112 S. Ct. 1735, 1740 (1992). Respondent simply claims without elaboration that the Bureau was "mistaken" in changing position, and that its purported error means that it is not entitled to any deference. Resp. Br. 21-22 n.9. But an agency "is not estopped from changing a view [it] believes to have been grounded upon a mistaken legal interpretation." *Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151, 2161 (1993). Any change in the agency's position "might reduce, but would not eliminate," the deference owed to its interpretation. *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 817 (1995).

language, structure, history, and consistent administrative interpretation of Section 3585(b) and of related sentencing statutes all support the conclusion that restrictive conditions of bail are not "official detention." This accordingly is not a case in which the Court is left with an ambiguous statute "at the end of the process of construing what Congress has expressed." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961); see also *National Organization for Women, Inc.* v. *Scheidler*, 114 S. Ct. 798, 806 (1994).

That conclusion is not changed by the division of authority on which respondent relies. A statute "is not " 'ambiguous' for purposes of lenity merely because it [is] *possible* to articulate a construction more narrow than that urged by the Government," or because there is "a division of judicial authority" over the proper construction. *Moskal* v. *United States*, 498 U.S. 103, 108 (1990); see also *Smith* v. *United States*, 113 S. Ct. at 2059. If that were sufficient, "one court's unduly narrow reading of a criminal statute would become binding on all other courts, including this one." *Moskal* v. *United States*, 498 U.S. at 108; see also *Chapman* v. *United States*, 500 U.S. at 467-468.

5. Amicus USC Law Center contends that the Bureau of Prisons' interpretation of Section 3585(b) should be rejected, because it would raise "serious constitutional questions" under the equal protection component of the Due Process Clause of the Fifth Amendment. USC Br. 20. According to USC Law Center, the legislative scheme irrationally treats people like respondent differently from sentenced prisoners who may serve parts of their sentences in a

halfway house and from prisoners who are granted credit for periods of state custody. *Id.* at 21-23.[7]

As this Court has often emphasized, legislative classifications are "presumed to be valid," *Lyng* v. *Automobile Workers*, 485 U.S. 360, 370 (1988) (internal quotation marks omitted); see also *Heller* v. *Doe*, 113 S. Ct. 2637, 2643 (1993), especially "where the legislature must necessarily engage in a process of line-drawing," *FCC* v. *Beach Communications*, 113 S. Ct. 2096, 2102 (1993) (internal quotation marks omitted). That process "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Ibid.*; see also *Chapman* v. *United States*, 500 U.S. at 464-465 (rational basis review applies to sentencing statute). Indeed, Congress may choose to further its object by drawing a line that simply serves adminis-

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[7] Although respondent raised an equal protection claim in his petition for habeas corpus, he waived that claim in the court of appeals (Pet. App. 3a n.1) and he has not renewed it here. No equal protection question as to his individual circumstances is therefore properly before the Court. See, *e.g.*, *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981) (noting that the court does not decide issues raised by amici that were not decided by the court of appeals or argued by the interested party); *Bell* v. *Wolfish*, 441 U.S. 520, 531 n.13 (1979) (same). The only equal protection question before the Court is whether the statutory classification is sufficiently likely to be *facially* unconstitutional that the Court should reject the government's interpretation of the credit statute. Cf. *Chapman* v. *United States*, 500 U.S. 453, 464-466 (1991); *Schall* v. *Martin*, 467 U.S. 253, 268-269 n.18 (1984). Amicus has not demonstrated that here.

trative convenience. *Vance* v. *Bradley*, 440 U.S. 93, 109 (1979); see also *United States* v. *Locke*, 471 U.S. 84, 93 (1985) (statute requiring filing of claim "prior to December 31" not irrational when applied to bar claimants who filed *on* December 31); *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 592 (1979).

It was not irrational for Congress to provide credit only for defendants who are remanded to the custody of correctional authorities, since it will generally be true that defendants who are granted conditional release do not suffer, as a class, so great a deprivation of liberty as those who are remanded. Even if some forms of release on bond could be viewed as functionally equivalent to incarceration, as amicus USC Law Center contends, Congress was "not required to take an all-or-nothing approach," but could proceed "one step at a time, addressing itself to the phase of the problem that seem[ed] most acute to the legislative mind." *Bowen* v. *Owens*, 476 U.S. 340, 347 (1986) (quoting *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955)); *FCC* v. *Beach Communications*, 113 S. Ct. at 2102. Contrary to amicus' submission, no principle of equal protection compelled Congress to "accept[] an intermediate point on an uncertain line," *New York Transit Authority* v. *Beazer*, 440 U.S. at 592, by choosing a functional case-by-case approach to the credit issue.[8]

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[8] Amicus notes (USC Br. 15 n.9) that the Eleventh Circuit accepted an equal protection argument in *Johnson* v. *Smith*, 696 F.2d 1334 (1983). That ruling was based solely on a concession by the attorney for the government, which the court treated as a waiver of the government's equal protection arguments. *Id.* at 1338-1339 & n.5. When the merits of the equal protection argument have been properly presented, the courts of appeals have uniformly rejected it, concluding that

6. Respondent emphasizes the purportedly limited rule announced by the decision below, which he believes will result in few awards of credit, and he contends that the Bureau of Prisons should have no difficulty applying that rule simply by consulting the terms of the bail form to ascertain whether the express terms of that order impose "total confinement." Resp. Br. 29-30, 32-34; see also USC Br. 23-26 (Bureau can apply court of appeals' holding by looking at "court files").

Respondent did not seek habeas corpus on the theory that the order setting his conditions of release, by itself, demonstrated his entitlement to credit; he contended instead that the restrictions actually placed on his liberty were functionally no different from incarceration. See J.A. 23. Nor did the court of appeals rule for respondent on the basis of the text of his bail form; had the court done so there would have been no need to remand for a hearing on the restrictiveness of the conditions under which respondent lived while on bail. Pet. App. 23a-24a. And

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pre-trial and post-sentence claimants of credit are not similarly situated. See, *e.g.*, *Moreland* v. *United States*, 968 F.2d 655, 660 (8th Cir.) (en banc), cert. denied, 113 S. Ct. 675 (1992); *United States* v. *Edwards*, 960 F.2d 278, 283-285 (2d Cir. 1992); *United States* v. *Woods*, 888 F.2d 653, 656-657 (10th Cir. 1989), cert. denied, 494 U.S. 1006 (1990); *Ramsey* v. *Brennan*, 878 F.2d 995, 997 (7th Cir. 1989); see also *Edwards* v. *United States*, 41 F.3d 154, 157 (3d Cir. 1994), petition for cert. filed, No. 94-8467 (Mar. 1, 1995); *United States* v. *Smith*, 869 F.2d 835, 837 (5th Cir. 1989). The Eleventh Circuit has recently emphasized the limited scope of its *Johnson* decision in rejecting, on the merits, the equal protection claim of a prisoner who, like respondent, was required to reside at a halfway house as a condition of bail. *Dawson* v. *Scott*, No. 93-6240 (Apr. 6, 1995), slip op. 19-30 & n.20.

reliance on the bail order alone would rarely be sufficiently informative about the actual conditions of release. Bail orders must describe whether the defendant was "detained" or "released," but the particular wording of conditions of release is up to the judicial officer. Even a condition of "total confinement" may well be subject to exceptions for outings with relatives, meetings with counsel or law enforcement agents, or for other purposes. In practice, the restriction may be far less onerous than appears from the face of the order.

The fact that few prisoners may receive credit at the conclusion of litigation does not eliminate the substantial costs of the rule adopted by the court of appeals. Experience teaches that prisoners who were subjected to various forms of presentence constraint will actively litigate claims to credit based on their individual circumstances.[9] Indeed, after its decision in this case, the court of appeals considered whether a requirement of home confinement as a condition of bail required an award of sentencing credit. *Edwards* v. *United States*, 41 F.3d 154 (3d Cir. 1994), petition

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[9] See, *e.g.*, *Edwards* v. *United States*, 41 F.3d at 155-156 (home confinement as a condition of bail); *Fraley* v. *Bureau of Prisons*, 1 F.3d 924, 925 (9th Cir. 1993) (per curiam) (prisoners required to stay at home pending trial); *Lahey* v. *Floyd*, 992 F.2d 234, 235-236 (9th Cir. 1993) (same); *United States* v. *Browning*, 761 F. Supp. 681, 682 (C.D. Cal. 1991) (same); see also *Grady* v. *Crabtree*, 958 F.2d 874, 875 (9th Cir. 1992) (prisoner confined at halfway house as a condition of post-trial probation); *United States* v. *Freeman*, 922 F.2d 1393, 1396-1397 (9th Cir. 1991) (prisoner claiming credit for time on pre-trial "probation"); *Malosh* v. *Crabtree*, 758 F. Supp. 620, 621 (D. Or. 1991) (prisoner required to reside on a military base as a condition of pre-trial release).

for cert. filed, No. 94-8467 (Mar. 1, 1995). The court rejected the claim only after analyzing in detail the extent to which the Pretrial Services Agency, in whose custody the defendant had been placed, actually allowed the defendant to leave his home for social occasions or choir practice. *Id.* at 156-157.[10]

Finally, respondent contends that information required by the court of appeals' rule should be easily available to the Bureau from court files. As was the case here (J.A. 9), however, most defendants released on bail with a condition of community confinement are placed in the legal custody of the Pretrial Services Agency for the district of their residence, which functions under the supervision of the court pursuant to specific statutory authority. See 18 U.S.C. 3152 *et seq.* Information collected by that agency is not freely available to the government. See 18 U.S.C. 3153(c)(1). While amicus contends that Presentence Investigation Reports prepared by the Probation Department "should" easily contain information about the defendant's conditions of release (USC Br. 24), there is no basis for assuming that the full range of information needed to satisfy the court of appeals' approach will be ascertainable from those reports (*id.* at 24-25).[11] As we have already

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[10] The *Edwards* case also illustrates the dangers of forum shopping and repetitive litigation that nationwide adoption of a "functional" approach to the credit issue is likely to create, because the defendant relied on the Third Circuit's approach to relitigate a claim that had already been rejected on the merits by the Second Circuit. See *United States* v. *Edwards*, 960 F.2d at 282-283.

[11] Amicus also mistakenly suggests (USC Br. 24) that by requiring that the presentence report reflect the defendant's adjustment to supervision, the Administrative Office of the

noted, that was not the approach taken by the court of appeals nor is it one that is likely to be workable in light of the flexibility available to courts in framing conditions of release under the Bail Reform Act of 1984.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

APRIL 1995

United States Courts has required a detailed description of any conditions of bail. As the Manual cited by amicus makes clear, what the report must describe is the defendant's attitudinal response to supervision, not the details of his bail package:

> If, as a condition of release, the defendant has been under pretrial supervision, describe the defendant's performance. Positive adjustment, such as payment of restitution to the victim or successful completion of a residential substance abuse program, is included as well as negative adjustment[,] such as positive urinalysis or failure to report to the pretrial services officer as directed.

Administrative Office of the United States Courts, *The Presentence Investigation Report for Defendants Sentenced Under the Sentencing Reform Act of 1984* (Publication 107) at II-34 (rev. Mar. 1992). The only reference to bail that the report usually contains is that the "face sheet" or cover page sets forth a one- or two-line summary of the bail order. See *id.* at II-25 to II-26. The report prepared for respondent is typical of the minimal level of detail that is actually provided. Under the heading "custodial status" that report stated as follows: "Personal Recognizance coupled with Pre-trial Service supervision and residency at Volunteers of America." See Presentence Investigation Report 1 (Sept. 16, 1991).

APPENDIX

Title 18, United States Code (1988 & Supp. V 1993)*, provides:

CHAPTER 229—POSTSENTENCE ADMINISTRATION

SUBCHAPTER C—IMPRISONMENT

§ 3621. Imprisonment of a convicted person

(a) Commitment to custody of Bureau of Prisons.—A person who has been sentenced to a term of imprisonment pursuant to the provisions of subchapter D of chapter 227 shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.

(b) Place of imprisonment.—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

(1) the resources of the facility contemplated;

* As amended by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1801.

(2) the nature and circumstances of the offense;

(3) the history and characteristics of the prisoner;

(4) any statement by the court that imposed the sentence—

(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or

(B) recommending a type of penal or correctional facility as appropriate; and

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

In designating the place of imprisonment or making transfers under this subsection, there shall be no favoritism given to prisoners of high social or economic status. The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another. The Bureau shall make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse.

(c) Delivery of order of commitment.—When a prisoner, pursuant to a court order, is placed in the custody of a person in charge of a penal or correctional facility, a copy of the order shall be delivered to such person as evidence of this authority to hold the prisoner, and the original order, with the return endorsed thereon, shall be returned to the court that issued it.

(d) Delivery of prisoner for court appearances.—The United States marshal shall, without charge, bring a prisoner into court or return him to a prison facility on order of a court of the United States or on written request of an attorney for the Government.

(e) Substance abuse treatment.—

(1) Phase-in.—In order to carry out the requirement of the last sentence of subsection (b) of this section, that every prisoner with a substance abuse problem have the opportunity to participate in appropriate substance abuse treatment, the Bureau of Prisons shall, subject to the availability of appropriations, provide residential substance abuse treatment (and make arrangements for appropriate aftercare)—

(A) for not less than 50 percent of eligible prisoners by the end of fiscal year 1995, with priority for such treatment accorded based on an eligible prisoner's proximity to release date;

(B) for not less than 75 percent of eligible prisoners by the end of fiscal year 1996, with priority for such treatment accorded based on an eligible prisoner's proximity to release date; and

(C) for all eligible prisoners by the end of fiscal year 1997 and thereafter, with priority for such treatment accorded based on an eligible prisoner's proximity to release date.

(2) Incentive for prisoners' successful completion of treatment program.—

(A) Generally.—Any prisoner who, in the judgment of the Director of the Bureau of Prisons, has successfully completed a program

of residential substance abuse treatment provided under paragraph (1) of this subsection, shall remain in the custody of the Bureau under such conditions as the Bureau deems appropriate. If the conditions of confinement are different from those the prisoner would have experienced absent the successful completion of the treatment, the Bureau shall periodically test the prisoner for substance abuse and discontinue such conditions on determining that substance abuse has recurred.

(B) Period of custody.—The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

(3) Report.—The Bureau of Prisons shall transmit to the Committees on the Judiciary of the Senate and the House of Representatives on January 1, 1995, and on January 1 of each year thereafter, a report. Such report shall contain—

(A) a detailed quantitative and qualitative description of each substance abuse treatment program, residential or not, operated by the Bureau;

(B) a full explanation of how eligibility for such programs is determined, with complete information on what proportion of prisoners with substance abuse problems are eligible; and

(C) a complete statement of to what extent the Bureau has achieved compliance with the requirements of this title.

(4) Authorization of appropriations.—There are authorized to be appropriated to carry out this subsection—

.(A) $13,500,000 for fiscal year 1996;

(B) $18,900,000 for fiscal year 1997;

(C) $25,200,000 for fiscal year 1998;

(D) $27,000,000 for fiscal year 1999; and

(E) $27,900,000 for fiscal year 2000.

(5) Definitions.—As used in this subsection—

(A) the term "residential substance abuse treatment" means a course of individual and group activities, lasting between 6 and 12 months, in residential treatment facilities set apart from the general prison population—

(i) directed at the substance abuse problems of the prisoner; and

(ii) intended to develop the prisoner's cognitive, behavioral, social, vocational, and other skills so as to solve the prisoner's substance abuse and related problems;

(B) the term "eligible prisoner" means a prisoner who is—

(i) determined by the Bureau of Prisons to have a substance abuse problem; and

(ii) willing to participate in a residential substance abuse treatment program; and

(C) the term "aftercare" means placement, case management and monitoring of the participant in a community-based substance abuse treatment program when the participant leaves the custody of the Bureau of Prisons.

(6) Coordination of Federal assistance.—The Bureau of Prisons shall consult with the Department of Health and Human Services concerning substance abuse treatment and related services and the incorporation of applicable components of existing comprehensive approaches including relapse prevention and aftercare services.

§ 3622. Temporary release of a prisoner

The Bureau of Prisons may release a prisoner from the place of his imprisonment for a limited period if such release appears to be consistent with the purpose for which the sentence was imposed and any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2), if such release otherwise appears to be consistent with the public interest and if there is reasonable cause to believe that a prisoner will honor the trust to be imposed in him, by authorizing him, under prescribed conditions, to—

(a) visit a designated place for a period not to exceed thirty days, and then return to the same or another facility, for the purpose of—

(1) visiting a relative who is dying;

(2) attending a funeral of a relative;

(3) obtaining medical treatment not otherwise available;

(4) contacting a prospective employer;

(5) establishing or reestablishing family or community ties; or

(6) engaging in any other significant activity consistent with the public interest;

(b) participate in a training or educational program in the community while continuing in official detention at the prison facility; or

(c) work at paid employment in the community while continuing in official detention at the penal or correctional facility if—

(1) the rates of pay and other conditions of employment will not be less than those paid or provided for work of a similar nature in the community; and

(2) the prisoner agrees to pay to the Bureau such costs incident to official detention as the Bureau finds appropriate and reasonable under all the circumstances, such costs to be collected by the Bureau and deposited in the Treasury to the credit of the appropriation available for such costs at the time such collections are made.

§ 3623. Transfer of a prisoner to State authority

The Director of the Bureau of Prisons shall order that a prisoner who has been charged in an indictment or information with, or convicted of, a State felony, be transferred to an official detention facility within such State prior to his release from a Federal prison facility if—

(1) the transfer has been requested by the Governor or other executive authority of the State;

(2) the State has presented to the Director a certified copy of the indictment, information, or judgment of conviction; and

(3) the Director finds that the transfer would be in the public interest.

If more than one request is presented with respect to a prisoner, the Director shall determine which request should receive preference. The expenses of such transfer shall be borne by the State requesting the transfer.

§ 3624. Release of a prisoner

(a) Date of release.—A prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

(b) Credit toward service of sentence for satisfactory behavior.—

(1) A prisoner (other than a prisoner serving a sentence for a crime of violence) who is serving a term of imprisonment of more than one year, other than a term of imprisonment for the duration of the prisoner's life, shall receive credit toward the service of the prisoner's sentence, beyond the time served, of fifty-four days at the end of each year of

the prisoner's term of imprisonment, beginning at the end of the first year of the term, unless the Bureau of Prisons determines that, during that year, the prisoner has not satisfactorily complied with such institutional disciplinary regulations as have been approved by the Attorney General and issued to the prisoner. A prisoner who is serving a term of imprisonment of more than 1 year for a crime of violence, other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with such institutional disciplinary regulations. If the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward service of the prisoner's sentence or shall receive such lesser credit as the Bureau determines to be appropriate. The Bureau's determination shall be made within fifteen days after the end of each year of the sentence. Credit that has not been earned may not later be granted. Credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

(2) Credit toward a prisoner's service of sentence shall not be vested unless the prisoner has earned or is making satisfactory progress toward a high school diploma or an equivalent degree.

(3) The Attorney General shall ensure that the Bureau of Prisons has in effect an optional General Educational Development program for inmates who have not earned a high school diploma or its equivalent.

(4) Exemptions to the General Educational Development requirement may be made as deemed appropriate by the Director of the Federal Bureau of Prisons.

(c) Pre-release custody.—The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community. The authority provided by this subsection may be used to place a prisoner in home confinement. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

(d) Allotment of clothing, funds, and transportation.—Upon the release of a prisoner on the expiration of the prisoner's term of imprisonment, the Bureau of Prisons shall furnish the prisoner with—

(1) suitable clothing;

(2) an amount of money, not more than $500, determined by the Director to be consistent with the needs of the offender and the public interest, unless the Director determines that the financial position of the offender is such that no sum should be furnished; and

(3) transportation to the place of the prisoner's conviction, to the prisoner's bona fide residence within the United States, or to such other place within the United States as may be authorized by the Director.

(e) Supervision after release.—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run during any period in which the person is imprisoned, in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days. No prisoner shall be released on supervision unless such prisoner agrees to adhere to an installment schedule, not to exceed two years except in special circumstances, to pay for any fine imposed for the offense committed by such prisoner.

(f) Mandatory functional literacy requirement.—

(1) The Attorney General shall direct the Bureau of Prisons to have in effect a mandatory functional literacy program for all mentally capable inmates who are not functionally literate in each Federal correctional institution within 6 months from the date of the enactment of this Act.

(2) Each mandatory functional literacy program shall include a requirement that each inmate participate in such program for a mandatory period sufficient to provide the inmate with an adequate opportunity to achieve functional literacy, and appropriate incentives which lead to successful completion of such programs shall be developed and implemented.

(3) As used in this section, the term "functional literacy" means—

(A) an eighth grade equivalence in reading and mathematics on a nationally recognized standardized test;

(B) functional competency or literacy on a nationally recognized criterion-referenced test; or

(C) a combination of subparagraphs (A) and (B).

(4) Non-English speaking inmates shall be required to participate in an English-As-A-Second-Language program until they function at the equivalence of the eighth grade on a nationally recognized educational achievement test.

(5) The Chief Executive Officer of each institution shall have authority to grant waivers for good cause as determined and documented on an individual basis.

(6) A report shall be provided to Congress on an annual basis summarizing the results of this program, including the number of inmate participants, the number successfully completing the program, the number who do not successfully complete the program, and the reasons for failure to successfully complete the program.

§ 3625. Inapplicability of the Administrative Procedure Act

The provisions of sections 554 and 555 and 701 through 706 of title 5, United States Code, do not apply to the making of any determination, decision, or order under this subchapter.

§ 3626. Appropriate remedies with respect to prison crowding

(a) Requirement of showing with respect to the plaintiff in particular.—

(1) Holding.—A Federal court shall not hold prison or jail crowding unconstitutional under the eighth amendment except to the extent that an individual plaintiff inmate proves that the crowding causes the infliction of cruel and unusual punishment of that inmate.

(2) Relief.—The relief in a case described in paragraph (1) shall extend no further than necessary to remove the conditions that are causing the cruel and unusual punishment of the plaintiff inmate.

(b) Inmate population ceilings.—

(1) Requirement of showing with respect to particular prisoners.—A Federal court shall not place a ceiling on the inmate population of any Federal, State, or local detention facility as an equitable remedial measure for conditions that violate the eighth amendment unless crowding is inflicting cruel and unusual punishment on particular identified prisoners.

(2) Rule of construction.—Paragraph (1) shall not be construed to have any effect on Federal judicial power to issue equitable relief other than

that described in paragraph (1), including the requirement of improved medical or health care and the imposition of civil contempt fines or damages, where such relief is appropriate.

(c) Periodic reopening.—Each Federal court order or consent decree seeking to remedy an eighth amendment violation shall be reopened at the behest of a defendant for recommended modification at a minimum of 2-year intervals.

* * * * *

CHAPTER 305—COMMITMENT AND TRANSFER

§ 4082. Commitment to Attorney General; residential treatment centers; extension of limits of confinement; work furlough

(a) The willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed to an institution or facility designated by the Attorney General, shall be deemed an escape from the custody of the Attorney General punishable as provided in chapter 35 of this title.

(b)(1) The Attorney General shall, upon the request of the head of any law enforcement agency of a State or of a unit of local government in a State, make available as expeditiously as possible to such agency, with respect to prisoners who have been convicted of felony offenses against the United States and who are confined at a facility which is a residential community treatment center located in the geographical area in which such agency has jurisdiction, the following information maintained by the Bureau of Prisons (to the extent that the Bureau of Prisons maintains such information)—

(A) the names of such prisoners;

(B) the community treatment center addresses of such prisoners;

(C) the dates of birth of such prisoners;

(D) the Federal Bureau of Investigation numbers assigned to such prisoners;

(E) photographs and fingerprints of such prisoners; and

(F) the nature of the offenses against the United States of which each such prisoner has been convicted and the factual circumstances relating to such offenses.

(2) Any law enforcement agency which receives information under this subsection shall not disseminate such information outside of such agency.

(c) As used in this section—

the term "facility" shall include a residential community treatment center; and

the term "relative" shall mean a spouse, child (including stepchild, adopted child or child as to whom the prisoner, though not a natural parent, has acted in the place of a parent), parent (including a person who, though not a natural parent, has acted in the place of a parent), brother, or sister.